

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

7	RITA RAE CLARK,)
8	Plaintiff,) No. CV-10-0033-CI
9	v.) ORDER GRANTING PLAINTIFF'S
10	MICHAEL J. ASTRUE,) MOTION FOR SUMMARY JUDGMENT
11	Commissioner of Social) AND REMANDING FOR ADDITIONAL
12	Security,) PROCEEDINGS
13	Defendant.)

BEFORE THE COURT are cross-Motions for Summary Judgment. (ECF No. 12, 17.) Attorney Larry A. Weiser represents Rita Rae Clark (Plaintiff); Special Assistant United States Attorney Mathew Pile represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 24.) After reviewing the administrative record and briefs filed by the parties, **IT IS ORDERED** Plaintiff's Motion for Summary Judgment is **GRANTED**, and the matter is reversed and remanded to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

On November 16, 2006, Plaintiff protectively filed for Disability Insurance benefits (DIB). (Tr. 111.) She alleged disability due to high blood pressure, fibromyalgia, arthritis and limited mobility in her neck, left knee and back, with an alleged

1 onset date of September 15, 2006. (Tr. 115.) Benefits were denied
2 initially and on reconsideration. Plaintiff requested a hearing
3 before an administrative law judge (ALJ), which was held before ALJ
4 R.S. Chester on July 22, 2008. (Tr. 28-79.) Plaintiff, who was
5 represented by legal counsel, and vocational expert K. Diane Kramer
6 (VE) testified. The ALJ denied benefits and the Appeals Council
7 denied review. (Tr. 15-27, 1-3.) The instant matter is before this
8 court pursuant to 42 U.S.C. § 405(g).

9 **STATEMENT OF THE CASE**

10 The facts of the case are set forth in detail in the transcript
11 of proceedings and are briefly summarized here. Plaintiff was 65
12 years old at the time of the hearing. (Tr. 37.) She lived with her
13 spouse in a single level duplex. She and her spouse are retired
14 with two grown children. (Tr. 38-39.) Plaintiff had an 8th or 9th
15 grade education, did not obtain a graduate equivalency degree or
16 attend vocational school. (Tr. 40.) Her past work was as a self-
17 taught bookkeeper/office manager, a job she performed for the family
18 business. (Tr. 40-43.) She testified she worked at home and
19 supervised the keeping of accounts by reviewing records sent to her
20 by the company bookkeeper. (Tr. 48.) She testified between 1996
21 and 2006 she was working part-time because of pain from
22 fibromyalgia, left knee problems, and headaches. (Tr. 44.) She
23 testified after being involved in a motor vehicle accident in 2005,
24 her symptoms worsened and she could no longer sustain work because
25 of pain and inability to concentrate. (Tr. 54.) Regarding physical
26 limitations, she reported could sit 15 minutes, walk for two blocks,
27 and sit/stand for ten minutes, and needs to nap two times a day due
28 to fatigue. (Tr. 58, 66-68, 72.) She reported she cooks and does

1 light housekeeping, goes camping with her spouse in their motor
2 home, attends church, and socializes with friends and family. (Tr.
3 59-60.)

4 ADMINISTRATIVE DECISION

5 The ALJ Chester found Plaintiff met insured status requirements
6 for DIB purposes through December 31, 2008.¹ (Tr. 18, 20.) At step
7 one of the sequential evaluation, he found Plaintiff had not engaged
8 in substantial gainful activity since September 15, 2006, the
9 alleged onset date. (Tr. 20.) At step two, he found Plaintiff had
10 severe impairments of "fibromyalgia; complex tension/migraine
11 headaches; right torn rotator cuff; and osteoarthritis of the left
12 knee." *Id.* He found non-severe impairments of neck arthritis, back
13 pain, incontinence, and irritable bowel. (Tr. 22.) At step three
14 he found Plaintiff's impairments, alone or in combination, did not
15 meet or medically equal an administratively recognized level
16 impairment listed in Appendix 1, Subpart P, Regulations No. 4
17 (Listings). (*Id.*)

18 At step four, the ALJ found Plaintiff's testimony was not
19 entirely credible and determined she had the residual functional
20 capacity to perform sedentary work, but was limited to lifting and
21 carrying 10 pounds occasionally and frequently, standing and walking
22 at least two hours and sitting for six hours with a sit/stand
23 option. (*Id.*) He also limited her to occasional climbing of ramps
24 and stairs, crouching, crawling, and overhead work with her right
25 dominant hand; and he found she should avoid climbing ladders, ropes
26

27 ¹ Disability benefits are sought for the closed period from
28 September 16, 2006, through December 31, 2008.

1 or scaffolds, extreme cold, noise, hazardous machinery or heights.
2 (*Id.*)

3 Considering the entire record, Plaintiff's credible testimony
4 and VE testimony, the ALJ determined Plaintiff could still perform
5 her past work of bookkeeper "as actually and generally performed."
6 (Tr. 25-27.) He concluded Plaintiff was not under a disability from
7 September 15, 2006, through the date of his decision. (Tr. 27.)

8 STANDARD OF REVIEW

9 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
10 court set out the standard of review:

11 The decision of the Commissioner may be reversed only
12 if it is not supported by substantial evidence or if it is
13 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
14 1097 (9th Cir. 1999). Substantial evidence is defined as
15 being more than a mere scintilla, but less than a
16 preponderance. *Id.* at 1098. Put another way, substantial
17 evidence is such relevant evidence as a reasonable mind
18 might accept as adequate to support a conclusion.
19 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the
20 evidence is susceptible to more than one rational
21 interpretation, the court may not substitute its judgment
22 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
23 *Morgan v. Commissioner of Social Sec. Admin.* 169 F.3d 595,
24 599 (9th Cir. 1999).

25 The ALJ is responsible for determining credibility,
26 resolving conflicts in medical testimony, and resolving
27 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
28 Cir. 1995). The ALJ's determinations of law are reviewed
de novo, although deference is owed to a reasonable
construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

29 It is the role of the trier of fact, not this court, to resolve
30 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
31 supports more than one rational interpretation, the court may not
32 substitute its judgment for that of the Commissioner. *Tackett*, 180
33 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
34 Nevertheless, a decision supported by substantial evidence will

1 still be set aside if the proper legal standards were not applied in
2 weighing the evidence and making the decision. *Browner v. Secretary*
3 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
4 there is substantial evidence to support the administrative
5 findings, or if there is conflicting evidence that will support a
6 finding of either disability or non-disability, the finding of the
7 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
8 1230 (9th Cir. 1987).

9 SEQUENTIAL EVALUATION PROCESS

10 The Commissioner has established a five-step sequential
11 evaluation process for determining whether a person is disabled. 20
12 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4); see *Bowen v. Yuckert*, 482
13 U.S. 137, 140-42 (1987). In steps one through four, the burden of
14 proof rests upon the claimant to establish a prima facie case of
15 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d
16 920, 921 (9th Cir. 1971). This burden is met once a claimant
17 establishes that a medically determinable physical or mental
18 impairment prevents her from engaging in his previous occupation.
19 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "This requires the
20 presentation of 'complete and detailed objective medical reports of
21 his condition from licensed medical professionals.'" *Meanel v.*
22 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999).

23 If a claimant cannot do her past relevant work, the ALJ
24 proceeds to step five, and the burden shifts to the Commissioner to
25 show that (1) the claimant can make an adjustment to other work; and
26 (2) specific jobs exist in the national economy which claimant can
27 perform. 20 C.F.R. §§ 404.1520(a)(4)(v), .1520(g); 416.920(a)(4)(v),
28 .920(g); *Kail v. Heckler*, 722 F.2d 1496, 1497-98 (9th Cir. 1984).

The question is whether the ALJ's decision is supported by substantial evidence and free of legal error. Plaintiff argues the ALJ erred when he (1) improperly rejected her testimony; (2) failed to include all her limitations in the hypothetical question presented to the VE; (3) improperly rejected lay testimony; and (4) found she could still perform her past relevant work. (ECF No. 13 at 12.)

I. Credibility

The Commissioner's credibility determination must be supported by findings sufficiently specific to permit the court to conclude the ALJ did not arbitrarily discredit claimant's testimony. *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9th Cir. 1991) (en banc). If there is no affirmative evidence that the claimant is malingering, the ALJ must provide "clear and convincing" reasons for rejecting the claimant's testimony regarding the severity of symptoms. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998).

The ALJ engages in a two-step analysis in deciding whether to admit a claimant's subjective symptom testimony. *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). Under the first step, the claimant must produce objective medical evidence of an underlying medically determinable impairment, and must show that the impairment, or a combination of impairments, "could reasonably be expected to produce pain or other symptoms." *Cotton v. Bowen*, 799 F.2d 1403, 1405 (9th Cir. 1986). However, once medical evidence of an impairment is presented, the ALJ cannot reject a claimant's symptom testimony because the severity alleged is not supported by

1 objective medical evidence. *Lester v. Chater*, 81 F.3d 821, 834 (9th
2 Cir. 1995). Once the *Cotton* test is met, the ALJ must evaluate the
3 credibility of the claimant by considering the objective medical
4 evidence along with treatment history; daily activities; work record
5 as well as the claimant's reputation for truthfulness;
6 inconsistencies in her testimony, or between her testimony and
7 conduct; and observations of physicians and third parties with
8 personal knowledge of the claimant's symptoms. *Tommasetti v.*
9 *Astrue*, 533 F.3d 1035, 1-39 (9th Cir. 2008); *Light v. Soc. Sec.*
10 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997). In addition, an
11 adjudicator may draw adverse inferences from a claimant's failure to
12 seek treatment for months after the alleged onset of disability.
13 *Bruton v. Massanari*, 268 F.3d 824, 828 (9th Cir. 2001).

14 If the ALJ finds a claimant's statements are not entirely
15 credible, he need not reject totally a claimant's symptom testimony.
16 The ALJ may find the claimant's statements about pain to be credible
17 to a certain degree, but discount statements based on his
18 interpretation of evidence in the record as a whole. *Social*
19 *Security Ruling (SSR)* 96-7p. If the ALJ's credibility findings are
20 supported by substantial evidence in the record, the court may not
21 engage in second-guessing. See *Morgan*, 169 F.3d at 600; *Fair v.*
22 *Bowen*, 885 F.2d 597, 604 (9th Cir. 1989) ("Credibility determinations
23 are the province of the ALJ."). However, an ALJ's failure to
24 articulate specific "clear and convincing" reasons for rejecting
25 Plaintiff's subjective complaints is reversible error. *Orn v.*
26 *Astrue*, 495 F.3d 625, 640 (9th Cir. 2007).

27 As discussed above, Plaintiff testified she is extremely
28 limited in her ability to sit, stand, and walk due to back pain and

1 left knee problems. She also stated she needed to lie down two
2 times a day to rest. (Tr. 24, 25, 69, 72.) Nonetheless, she
3 reported a social life that included attending her grandchildren's
4 sporting events, camping in a motor home with her spouse, attending
5 church, cooking breakfast for her grandson, and dinners out and
6 visits with friends and family. (Tr. 24, 59-62.) She testified she
7 suffered no side effects from medication and was able to do light
8 housekeeping during the day with rest breaks. (Tr. 57, 58.) She
9 also testified that if her headaches are not averted by medication,
10 she has to go to the hospital for an injection, or is "down" for
11 three or four days. (Tr. 51, 55.)

12 After summarizing Plaintiff's testimony, ALJ Chester found her
13 impairments could be expected to cause her alleged symptoms, but her
14 statements were not credible to the extent they precluded
15 performance of her past work. (Tr. 23-25.) He gave the following
16 reasons for discounting her testimony: treatment of her impairments
17 has been routine and conservative; no treating or examining doctor
18 has opined she is unable to perform work activities; the record
19 shows gaps in treatment for alleged symptoms; and she stopped taking
20 prescribed medication for symptoms (including headaches and
21 fibromyalgia) without consulting her doctor, even though she
22 reported less pain and no side effects. (Tr. 25.) These are "clear
23 and convincing" reasons supported by the record to discount
24 Plaintiff's symptom testimony.

25 For example, the record shows in February 2006 she saw Dr.
26 Bender for headache pain. Dr. Bender noted the recent motor vehicle
27 accident in November 2005, and her report of increasing frequency of
28 headaches. He also noted that he had not seen her since October

1 2004, a significant gap in treatment given the severity alleged by
2 Plaintiff. (Tr. 179.) Dr. Bender prescribed medication for
3 migraines and sleep problems. *Id.*

4 After her motor vehicle accident in November 2005, Plaintiff
5 was treated routinely through December 2006, for chronic back pain
6 and headache pain. (Tr. 180-193.) Treating physicians also assessed
7 fibromyalgia, migraine headaches, hypothyroidism and elevated blood
8 pressure. (Tr. 185, 191.) A combination of mild exercise and
9 medication was recommended for the fibromyalgia by treating
10 physician David Dean, M.D. (Tr. 187, 191.) In September 2006,
11 Plaintiff described her headaches as more frequent since the vehicle
12 accident, but stated they were "identical to a headache she has had
13 frequently for the last 20 years." (Tr. 182.) She was treated with
14 injections for headache pain and referred to her primary care
15 provider for headache management. (Tr. 183, 194.) The record
16 includes treatment records from a chiropractor in January 2007, and
17 physical therapy in March and April 2007. (Tr. 196-98, 207-18.)

18 There are no treating physician records between December 2006
19 and June 2007, when Plaintiff saw her orthopedist regarding right
20 shoulder pain and treatment options (Tr. 219-22), and again in May
21 2008, to discuss treatment for her shoulder and left knee pain. (Tr.
22 240.) Plaintiff testified conservative treatment of these
23 conditions has continued. (Tr. 52.) In addition, Plaintiff saw her
24 treating physician in May 2008 for fibromyalgia treatment after she
25 had discontinued her medication without discussing it with the
26 doctor. Her medication was re-started. (Tr. 252-53.) These
27 reports of infrequent visits and routine and conservative treatment
28 support the ALJ's credibility determination. *Parra v. Astrue*, 481

1 F.3d 742, 751 (9th Cir. 2007).

2 Although Plaintiff's examining and treating physicians did not
3 question her credibility, the ALJ properly considered medical
4 evidence and found no neurological abnormalities were noted, no
5 severe restrictions on her activities were recommended, and her
6 physicians did not opine she should refrain from work activities.
7 (Tr. 25.) The record also shows Plaintiff, without consulting her
8 doctor, discontinued taking prescribed medication for fibromyalgia,
9 pain, and hypothyroidism. (Tr. 180, 252.) As found by the ALJ,
10 the cessation of medication for allegedly disabling symptoms
11 undermines Plaintiff's credibility. (Tr. 25); *Tommasetti v. Astrue*,
12 533 F.3d 1035, 1039 (9th Cir. 2008).

13 Regarding the ALJ's finding that Plaintiff's report of daily
14 activities is unreliable because it cannot be objectively verified,
15 this reason is neither specific nor "clear and convincing." (Tr.
16 25.) Likewise, the ALJ erred in discounting Plaintiff's symptom
17 testimony because medical evidence does not support the degree of
18 severity alleged. (*Id.*) *Lester*, 81 F.3d at 834; *Cotton* 799 F.2d at
19 1407. However, because the ALJ gave other "clear and convincing"
20 reasons to discount Plaintiff's testimony, the erroneous reasons are
21 harmless. *Carmickle v. Astrue*, 533 F.3d 1155, 1160-63 (9th Cir.
22 2008); *Batson v. Commissioner of Social Sec. Admin.*, 359 F.3d 1190,
23 1197 (9th Cir. 2004).

24 The ALJ reasonably found Plaintiff was not as severely
25 restricted as she represented in her testimony. He articulated
26 "clear and convincing" reasons for discounting her self-reported
27 limitations, and the record supports his reasoning. Therefore, his
28 credibility determination is affirmed.

1 **II. Step Four - RFC Findings and Past Relevant Work**

2 At step four, the Commissioner makes RFC findings, and
3 determines if a claimant can perform past relevant work. Although
4 the burden of proof lies with the claimant at step four, the ALJ
5 still has a duty to make the requisite factual findings to support
6 his conclusion. SSR 82-62. This is done by looking at the
7 "residual functional capacity and the physical and mental demands"
8 of the claimant's past relevant work. 20 C.F.R. §
9 404.1520(a)(4)(iv). These findings should be based on Plaintiff's
10 written work history in the record, as well as her hearing
11 testimony, VE testimony, and/or information contained in the
12 DICTIONARY OF OCCUPATIONAL TITLES (DICOT). 20 C.F.R. § 404.1560(b).

13 The RFC assessment is a description of a claimant's ability to
14 perform work-related activities. SSR 96-5p. It is based upon all
15 relevant evidence in the record, including the claimant's own
16 statement. Past relevant work is work performed in the last 15
17 years, which lasted long enough to learn it and was substantial
18 gainful employment. 20 C.F.R. §§ 404.1571-.1575; SSR 82-61. The
19 15-year guide (recency requirement) in determining past relevant
20 work "is intended to insure that remote work experience which could
21 not reasonably be expected to be of current relevance is not
22 applied." SSR 82-62. Substantial gainful employment is work for
23 which a person normally gets paid, whether or not payment is
24 received. 20 C.F.R. § 404.1571. Even if work is not "substantial
25 gainful activity," it may evidence an ability to do more work than
26 a claimant actually did. *Id.*

27 In finding that an individual has the capacity to perform a
28 past relevant job at step four, the ALJ's decision must contain

1 among the findings the following specific findings of fact:

2 1. A finding of fact as to the individual's residual
3 functional capacity;

4 2. A finding of fact as to the physical and mental demands of
5 the past job/occupation; and

6 3. A finding of fact that the individual's residual
7 functional capacity would permit a return to his or her past job or
8 occupation. SSR 82-62.

9 The ALJ must assess Plaintiff's ability to perform each of the
10 strength demands; discuss her ability to perform sustained work
11 activities in an ordinary work setting on a regular and continuing
12 basis; and carefully compare her restrictions with exertional
13 demands of sedentary work as defined by the Regulations. SSR 96.8p.
14 The effects of all impairments, mental and physical, as well as
15 resultant pain and fatigue, must be considered in combination in the
16 RFC determination. Further, step four findings must be based on
17 identified evidence in the record and must be developed and fully
18 explained in the disability decision. As the Ninth Circuit recently
19 stated, "[t]his requires specific findings" on all three points
20 sufficient "to insure that the claimant really can perform his past
21 relevant work." *Pinto v. Massanari*, 249 F.3d 840, 845 (9th Cir.
22 2001).

23 Here, the ALJ did not make the required function by function
24 assessment at step four. He failed to articulate sufficiently
25 specific findings regarding the effect of Plaintiff's impairments in
26 combination (including documented pain and fatigue due to
27 fibromyalgia), and the physical and mental demands of Plaintiff's
28 past relevant work in her family business. He also failed to

1 discuss her ability to perform work in an ordinary work setting on
2 a regular and continuing basis.

3 It is noted on independent review that Plaintiff's testimony
4 describing her work as a "bookkeeper," and the description in
5 written disability reports are not consistent. For example, in
6 application paperwork, she reported that between 1996 and September
7 2006, she worked 8 hours a day, five days a week for a boiler repair
8 business (Tr. 115, 131.) She reported she used machines, tools or
9 equipment, technical knowledge/skills, and did writing, reports or
10 similar duties. She represented her work required lifting and
11 carrying less than 10 pounds. (Tr. 116.) Her self-reported duties
12 included: "Bookkeeping, government reports, waiting on customers,
13 phone answering, selling product, payroll accounting." (Tr. 131.)
14 She also indicated she supervised three people 80% of her time. *Id.*
15 In her December 11, 2006, paperwork, she stated "the only difference
16 on my job the last couple of years is that I could not hold down any
17 hours. No more than 10 minutes of sitting or standing at one time
18 to work on anything without my body being completely stone [sic]
19 up." (Tr. 141.)

20 At the hearing, however, Plaintiff testified she worked for the
21 same family-owned company well over 30 years as a "self-taught"
22 bookkeeper. (Tr. 50.) She stated she had an 8th grade education and
23 no computer skills. (Tr. 40, 51.) Plaintiff testified she worked
24 full-time up until about 1966, after which she worked part-time for
25 the same business "overseeing the bookkeeping."² (Tr. 49-50.) She

26
27 ² The court notes on independent review that Plaintiff
28 testified she worked "gratis" for many of the years she and her

1 described her job duties over the last 15 years as tracking the
2 business payables and receivables, which differs significantly from
3 the written reports discussed above. (Tr. 42.) Specifically, she
4 testified she "overlooked" printed materials mailed to her by the
5 company bookkeeper (who had entered the data and created the
6 accounting spreadsheet on a computer) to make sure entries were made
7 in the proper category. (Tr. 49.) She testified she worked her own
8 hours, part-time, from her home in Spokane; after reviewing the
9 computer-generated spreadsheets mailed to her by the company
10 bookkeeper, she would call the bookkeeper with corrections,
11 questions and instructions. (Tr. 41, 44.) Although the ALJ
12 rejected to some degree Plaintiff's self-reported physical
13 limitations and pain complaints, he did not reject her description
14 of her limited job duties performed over the last 15 years. (Tr.
15 25.) The ALJ failed to explain his resolution of conflicts in the
16 evidence regarding the demands and duties of Plaintiff's past
17 relevant work (*i.e.*, over the past 15 years). Given Plaintiff's
18 unrejected testimony that she only worked part-time in a home
19 setting, a discussion of her ability to sustain work in an ordinary
20 job setting is critical. *Pinto*, 249 F.3d at 845.

21 _____
22 spouse owned the business. (Tr. 47; see also Tr. 106-10, *Earnings*
23 *Report*.) She testified her spouse drew a salary for both of them
24 because "it was a self-owned business." (Tr. 48.) Under the
25 Regulations, even though Plaintiff did not receive pay directly,
26 this work is considered substantial gainful activity. 20 C.F.R. §
27 404.1572(b)(work activity is gainful if usually done for pay or
28 profit, "whether or not a profit is realized").

1 Independent review of the hearing transcript also reveals that
2 in seeking vocational expert evidence regarding Plaintiff's past
3 work, the ALJ did not clarify which job duties and demands were
4 included in Plaintiff's past work experience. Rather, the
5 hypothetical individual upon which the VE based her testimony was
6 described generally as someone with Plaintiff's "background,
7 experience, training and education," and the RFC described above.
8 (Tr. 75.) Because the record has conflicting information regarding
9 exactly what Plaintiff's past relevant duties were, and there is no
10 evidence that the VE factored in Plaintiff's 8th or 9th grade
11 education, limited job experience, and lack of computer or other
12 technology skills, the court is unable to determine if Plaintiff
13 really can perform her past relevant work. *Pinto*, 249 F.3d at 845;
14 SSR 82-62 (past work experience must be considered carefully to
15 assure available facts support step four findings).

16 Not only is there conflicting evidence regarding Plaintiff's
17 past work as actually performed, the VE's testimony is ambiguous as
18 to whether Plaintiff can perform the functional demands of the
19 general occupation classification identified as her past relevant
20 work. *Pinto*, 249 F.3d at 845-46; see also SSR 82-61 (claimant is
21 not disabled if she retains RFC to perform actual functional demands
22 of past work OR functional demands of the occupation as generally
23 required). The record shows the VE simply referred to the DICOT
24 and concluded, without explanation, that Plaintiff's work was "best
25 described" as a Bookkeeper.³ (Tr. 74.) The Commissioner's policy

26
27 ³ The DICOT description for *Bookkeeper* is as follows:

28 Keeps records of financial transactions for establishment,

1 ruling instructs that "[f]inding that a claimant has the capacity to
2 do past relevant work on the basis of a generic occupational
3 classification of the work is likely to be fallacious and
4 unsupportable." SSR 82-61.

5 It is the Commissioner's responsibility to ensure the
6 credibility, completeness, and quality of the ALJ's vocational
7 expert report. *Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th Cir.
8 1984). Unless the record includes evidence to support the
9 assumptions upon which the expert's testimony is based, the
10 vocational expert's opinion is "meaningless." *Id.* In this case,
11 reliance on a generic classification to identify Plaintiff's past
12 relevant work is reversible error. *Pinto*, 249 F.3d at 845. Because
13 there are unresolved ambiguities and conflicts in the occupational
14 evidence in the record, the ALJ's step four findings are not
15 supported by substantial evidence. The ALJ did not explain

16
17 using calculator and computer: Verifies, allocates, and
18 posts details of business transactions to subsidiary
19 accounts in journals or computer files from documents,
20 such as sales slips, invoices, receipts, check stubs, and
21 computer printouts. Summarizes details in separate ledgers
22 or computer files and transfers data to general ledger,
23 using calculator or computer. Reconciles and balances
24 accounts. May compile reports to show statistics, such as
25 cash receipts and expenditures, accounts payable and
26 receivable, profit and loss, and other items pertinent to
27 operation of business. May calculate employee wages from
28 plant records or time cards and prepare checks for payment
of wages. May prepare withholding, Social Security, and
other tax reports. May compute, type, and mail monthly
statements to customers. May be designated according to
kind of records of financial transactions kept, such as
Accounts-Receivable Bookkeeper (clerical), and Accounts-
Payable Bookkeeper (clerical). May complete records to or
through trial balance.

GOE: 07.02.01 STRENGTH: S GED: R4 M4 L3 SVP:6 DLU:87

DICOT 210.382-014.

adequately his step four findings as directed by the Commissioner's policy ruling; therefore, remand is required.

III. Remedy

The question that remains is whether this case should be reversed and remanded for further proceedings or for the payment of benefits. The decision to remand for benefits or further proceedings is within the discretion of the court. *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990). Remand for further proceedings is appropriate when further administrative proceedings could remedy defects, *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989), or are necessary to develop a sufficient record. *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989). Here, resolution of evidentiary conflicts, and additional evidence and findings are necessary. On remand, the ALJ shall obtain additional evidence as necessary to make sufficient step four findings. In a new decision, he shall re-evaluate Plaintiff's past work experience and resolve conflicts in the occupational evidence with specific findings. The ALJ also will address lay testimony of record and give specific, "germane" reasons for rejecting or discounting lay opinions regarding Plaintiff's work-related limitations. *Valentine v. Commissioner, Social Sec. Admin.*, 574 F.3d 685, 694 (9th Cir. 2009).

Based on the ALJ's hypothetical which reflects a complete description and demands of Plaintiff's past relevant work, a vocational expert shall provide specific, relevant evidence "within [the VE's] expertise or knowledge concerning the physical and mental demands of claimant's past relevant work, either as [Plaintiff] actually performed it or as generally performed in the national economy." 20 C.F.R. § 404.1560(b)(2). The VE shall explain fully

1 the demands and skills of Plaintiff's past relevant work as actually
2 performed and opine as to whether Plaintiff retains the RFC to
3 perform it. In addition, the VE shall fully explain the DICOT job
4 classification applicable to Plaintiff's experience, and opine
5 whether Plaintiff is capable of performing the job as generally
6 performed. See SSR 00-4p (VE must explain inconsistencies between
7 VE evidence and DICOT information). If necessary, the ALJ shall
8 proceed to step five with the assistance of VE testimony. Plaintiff
9 may submit additional relevant evidence regarding past work duties,
10 as well as treatment of and limitations imposed by her impairments.
11 Accordingly,

12 **IT IS ORDERED:**

13 1. Plaintiff's Motion for Summary Judgment (**ECF No. 12**) is
14 **GRANTED**, and the matter is remanded to the Commissioner for
15 additional proceedings pursuant to 42 U.S.C. § 405(g) consistent
16 with this decision.

17 2. Judgment shall be entered for Plaintiff.

18 3. Defendant's Motion for Summary Judgment (**ECF No. 17**) is
19 **DENIED**.

20 4. Application for attorney's fees may be filed by separate
21 motion.

22 The District Court Executive is directed to file this Order and
23 provide copies to counsel for Plaintiff and Defendant.

24 DATED May 10, 2011.

25
26 S/ CYNTHIA IMBROGNO
27 UNITED STATES MAGISTRATE JUDGE
28